

Dated: September 18, 2013



UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

Daniel P. Collins
Daniel P. Collins, Bankruptcy Judge

In re

POTENTIAL DYNAMIX, LLC,

Debtor.

) In Chapter 11 proceedings

) Case No.: 2:11-bk-28944-DPC

) **ORDER DENYING TRUSTEE'S MOTION**
) **FOR SUMMARY JUDGMENT AND**
) **GRANTING AMAZON'S CROSS-**
) **MOTION FOR SUMMARY JUDGMENT**

) (Not for Publication- Electronic Docketing
) ONLY)¹

The Chapter 11 Trustee, Timothy Shaffer, (the "Trustee") seeks summary judgment granting the Debtor's motion to assume its contract with Amazon Services, LLC ("Amazon") pursuant to § 365² and denying Amazon's motion for relief from the automatic stay. Amazon filed a cross-motion for summary judgment opposing assumption of the contract and seeking stay relief to terminate the contract. The Court heard oral argument on the motions and now grants summary judgment in favor of Amazon.

¹ This decision sets forth the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues addressed constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b).

² Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 **I. Facts**

2 On January 18, 2011 the Debtor and Amazon entered into a Merchants Program
3 Agreement (the “Contract”). The Contract grants the Debtor the ability to sell its products
4 on Amazon’s website. As a condition to granting permission to sell its products on
5 Amazon’s website, the Debtor agreed to not list any “Excluded Products” for sale.
6 Excluded Products are defined in Section 1.1 of the Contract. Under the Contract,
7 Amazon reserved the right to identify Excluded Products that may be legal to sell but
8 which Amazon chooses not to allow for sale on its website for various reasons. Section
9 10.1 of the Contract details Amazon’s grounds to terminate the Contract, and provides, in
10 relevant part, as follows:
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13 Either Party may terminate the [Contract] at any time by written notice
14 to the other Party if the other Party materially breaches its obligations
15 hereunder, provided that (i) the non-breaching Party first sends written
16 notice to the breaching Party in accordance with Section 11.5 describing
17 the breach with reasonable particularity and referencing the specific
18 Section(s) of this Agreement breached and declaring intent to terminate
19 the Term on the basis of such breach in accordance with this Section; and
20 (ii) the breaching Party does not cure the breach within 30 days following
21 its receipt of such notice . . . [the "Default Notice"] Notwithstanding the
22 foregoing, the cure period described in clause (b)(ii) above will not apply
23 in the event of a material breach of Section 5, and in such event the non-
24 breaching Party may terminate the Term immediately . . . In addition to
25 the foregoing, Amazon may terminate the Term at any time during the
26 Term immediately upon written notice to Seller if Seller: (y) repeatedly
27 fails to perform its obligations under this Agreement.
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29 On eight separate occasions, between October 4, 2012 and December 13, 2012,
30 the Debtor offered Excluded Products for sale on the website and Amazon suppressed
31 each offer. Amazon sent a communication each time it suppressed the Debtor’s offers
32 advising the Debtor that the listing contained an Excluded Product and “that a failure to
33 comply with [Amazon’s] policies may result in the removal of [the Debtor’s] selling
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1 privileges.” (Gibson Declaration at Ex. 1, Dkt. No. 255). On December 18, 2012 Amazon
2 sent an email to the Debtor temporarily suspending its selling privileges until the Debtor
3 created a “detailed plan to ensure compliance with [Amazon’s] policies.” (Althausen
4 Declaration at Ex. 2, Dkt. No. 254). In response, the Debtor submitted a plan where its
5 inventory manager would ensure that each contemplated product offer does not violate
6 Amazon’s policies prior to listing such product for sale on Amazon’s website. Amazon
7 promptly reinstated the Debtor’s selling privileges but warned the Debtor that any further
8 listings of Excluded Products would jeopardize the Debtor’s selling privileges on
9 Amazon’s website.
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12 Despite prior warnings and the temporary suspension of the Debtor’s listing
13 privileges, the Debtor continued selling Excluded Products on the Amazon website.
14 Amazon points to seven of the Debtor’s offers to sell Excluded Products between
15 December 18, 2012 and April 11, 2013. (Gibson Declaration at ¶ 11, Dkt. No. 255).
16 Amazon suppressed all but one of these offers and sent the Debtor a notification each
17 time it suppressed such product offers, identifying the product as an Excluded Product
18 and warning the Debtor that a failure to comply may result in removal of the Debtor’s
19 selling privileges. (Gibson Declaration at ¶ 12, Dkt. No. 255). Finally, on April 11, 2013
20 Amazon sent the Debtor a letter terminating the Contract under Section 10.1.
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23 This Court earlier found that Amazon’s termination of the Contract was in
24 violation of the bankruptcy automatic stay. (Dkt. No. 262). Amazon’s April 11, 2013
25 Contract termination was void. The Contract was reinstated as of April 26, 2013. Amazon
26 thereafter filed a motion for relief from stay. The Debtor filed a motion to assume the
27 Contract. The Trustee then filed his motion for summary judgment. Amazon filed its
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1 cross-motion for summary judgment. The Court heard oral argument on the motions for
2 summary judgment and took the matter under advisement.

3 **II. Discussion**

4 Rule 56 of the Federal Rules of Civil Procedure governs summary judgment
5 motions and provides that summary judgment must be granted if the movant shows that
6 there is no genuine issue of material fact, and that the movant is entitled to judgment as a
7 matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 312, 322
8 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The movant has the
9 initial burden of demonstrating there are no genuine issues of material fact. *See Celotex*,
10 477 U.S. at 323. “A material fact is genuine ‘if the evidence is such that a reasonable jury
11 could return a verdict in favor of the non-moving party.’” *FreecycleSunnyvale v.*
12 *Freecycle Network*, 626 F.3d 509, 514 (9th Cir. 2010) (*quoting Liberty Lobby*, 477 U.S.
13 at 248).

14 In this case, there are no genuine issues of material fact.³ The parties agree the
15 Debtor repeatedly offered Excluded Products for sale on Amazon’s website. However,
16 the parties disagree whether this alone is enough to give Amazon the right to terminate
17 the Contract under Section 10.1.

18 Both parties agree there are two grounds to terminate the Contract under Section
19 10.1. One way to terminate the Contract following a breach is pursuant to the general rule
20 in Section 10.1 which states that the non-breaching party must provide the breaching
21 party with a Default Notice and allow the breaching party 30 days to cure its default. The

22 ³ The Trustee does not dispute any of the facts recounted in this order. However, the Trustee states that he
23 “disputes the accuracy and characterization of the facts . . . and, if this matter proceeds to trial, may present
24 evidence to the contrary. Nevertheless, these facts are not material to the Court’s ruling on the matter.
25 Therefore, solely for purposes of the matter, the Court may assume said facts to be true.” (Trustee’s
26 Controverting Statement of Facts, Dkt. No. 333).

1 Court finds that a Default Notice, as described in Section 10.1, was not provided to the
2 Debtor so Amazon cannot rely on this general rule to terminate the Contract.

3 The other way to terminate the Contract under Section 10.1 is an exception to the
4 general termination rule which provides that the Contract may be terminated due to a
5 repeated failure to perform under the Contract. The last sentence of Section 10.1 states:
6 “In addition to the foregoing, Amazon may terminate the Term at any time during the
7 Term immediately upon written notice to Seller if Seller: (y) repeatedly fails to perform
8 its obligations under this Agreement.” Amazon relies on this sentence as grounds to
9 terminate the Contract because the Debtor repeatedly failed to perform its obligations by
10 repeatedly offering Excluded Products for sale on Amazon’s website. The Trustee, on the
11 other hand argues that Amazon must send a Default Notice at least once before the
12 exception in the last sentence of Section 10.1 may apply.
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15 The Court agrees with Amazon’s interpretation of the Contract and finds that the
16 last sentence of Section 10.1 does not require Amazon to send a Default Notice prior to
17 terminating the Contract for the Debtor’s repeated failure to abide by the Contract’s
18 terms. The Trustee attempts to read “Default Notice” into the last sentence of Section
19 10.1. However, the language of Section 10.1 does not require a Default Notice to
20 terminate the Contract under this exception to the general rule.
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23 The Trustee contends that this interpretation of Section 10.1 places unreasonable
24 demands on the Debtor because it allows Amazon to terminate the Contract although the
25 Debtor may not know that its actions aggrieved Amazon. However, in this case the
26 Debtor unquestionably knew that Amazon was perturbed. The Debtor received numerous
27 notices that it was breaching the Contract by offering Excluded Products for sale. Its
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1 selling privileges were even suspended just prior to the Debtor's numerous additional
2 breaches. The Debtor knew it was failing to perform under the Contract and that there
3 was a significant risk that its actions could lead to termination of the Contract. This Court
4 finds Amazon has the right to terminate the Contract under Section 10.1.

5 A right to terminate the Contract under Section 10.1 alone is not enough to prevent
6 the Debtor from assuming the Contract. The Debtor may still assume the Contract under
7 § 365(b) if it cures all monetary and non-monetary defaults. *See In re Claremont*
8 *Acquisition Corp. Inc.*, 113 F.3d 1029 (9th Cir. 1997). However, if the defaults are non-
9 curable and "material or economically significant" then the Debtor may not assume the
10 Contract and Amazon would have "cause" for stay relief so that it may terminate the
11 Contract. *In re Clearwater Natural Resources, LP*, 2009 WL 2208463 at *3 (Bankr. E.D.
12 Ky. 2009) (*citing In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1092) (3rd Cir. 1990) (A
13 bankruptcy court may use its discretion to not enforce a contractual provision "in a
14 bankruptcy context in which there is no substantial economic detriment to the [non-
15 breaching party] shown, and in which enforcement would preclude the bankruptcy estate
16 from realizing the intrinsic value of its assets.>"). If the Debtor's repeated offers to sell
17 Excluded Products on Amazon's website were not "material or economically significant"
18 defaults then the Court may exercise its discretion and not enforce the provision allowing
19 Amazon to terminate the Contract but, rather, allow the Debtors to assume the Contract.

20 This Court finds the Debtor's repeated offers to sell Excluded Products are non-
21 curable defaults which are material and economically significant. The Debtor serially
22 listed Excluded Products for sale on Amazon's website. These listings cannot be undone.
23 By listing Excluded Products for sale on Amazon's website, the Debtor placed Amazon's
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1 customers at risk and jeopardized Amazon's reputation and standing with the Food and
2 Drug Administration and the consumer public. As a consequence of the Debtor's actions
3 Amazon could have been harmed financially. This is exactly why Amazon's Contract
4 contains these default provisions. The Debtor's repeated failures to properly perform its
5 contractual obligations were not only grounds to terminate the Contract under Section
6 10.1, but were also materially and economically significant defaults which prevent the
7 Debtor from assuming the Contract and, in turn, serve as "cause" to grant Amazon relief
8 from the bankruptcy automatic stay.
9

10 **III. Conclusion**

11 There are no genuine issues of material fact in this case. Amazon is entitled to
12 judgment as a matter of law. The Court denies the Trustee's motion for summary
13 judgment and grants Amazon's cross-motion for summary judgment. The Debtor may not
14 assume the Contract. Amazon is granted stay relief to send a letter terminating the
15 Contract pursuant to Section 10.1(y). Stay relief shall be effective 30 days from entry of
16 this order.
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19 **So ordered.**

20 Dated:

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DANIEL P. COLLINS
23 UNITED STATES BANKRUPTCY JUDGE
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25 COPY of the foregoing mailed by the BNC and/or
26 sent by auto-generated mail to:

27 All interested parties
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